Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1995

THO DINH TRAN,
Petitioner,

-against-

DINH TRUONG TRAN; THE ALPHONSE HOTEL CORP., d/b/a The Carter Hotels; JUDE HOTEL CORP., d/b/a The Hotel Kenmore,
Respondents,

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

Whether the Court of Appeals erred in failing to extend the doctrine of Barrentine to petitioner's common law and state law claims on the basis of waiver?

It is respectfully submitted that this question be answered in the affirmative.

Whether the Court of Appeals erred in failing to confront and resolve the issue of waiver of arbitration?

It is respectfuly submitted that this question be answered in the affirmative.

Whether the failure to affirmatively plead an affirmative defense under Federal Rule of Civil Procedure 8(c) constitutes a waiver of that defense under the rule of Johnson v. Zerbat?

It is respecfully submitted that this question be answered in the affirmative.

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ISSUES PRESENTED

Whether the Court of Appeals erred in failing to extend the doctrine of Barrentine to petitioner's common law and state law claims on the basis of waiver?

Whether the failure to affirmatively plead an affirmative defense under Federal Rule of Civil Procedure 8(c) constitutes a waiver of that defense under the rule of Johnson v. Zerbst?

OPINIONS BELOW

The Second Circuit in Tran v. Tran, 54 F. 3d 115 (2d Cir. 1995) (Reproduced at Appendix B at A3), affirmed in part and reversed in part a decision of the United States District Court of the Southern District of New York (Robert P. Patterson, Jr. D.J.) In Tran v. Tran, 847 S. Supp. 306.(S.D.N.Y. 1994) (Reproduced as Appendix C at A15); see also, Tran v. Tran, 860 F. Supp. 91 (S.D.N.Y. 1993) (Reproduced as Appendix D at A31).[1]

The Second Circuit opinion was unanimous. The Second Circuit, on a motion for re-hearing or en banc re-hearing adhered to the panel opinion by denying re-hearing or en banc consideration of this case. The denial of en banc review is reproduced as Appendix A at A2. The denial of the motion for en banc consideration was handed down on July

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[1] The opinion published in the later volume of the Federal Supplement is, in fact, the first opinion issued by the District Court which left certain issues open which were resolved by the second opinion.

19, 1995.[2]

The Second Circuit panel, in an opinion by United States District Judge Frank A. Kaufman[3], held that petitioner's wage and hour claims brought under the Fair Labor Standards Act (FLSA) could proceed in the District Court and reversed so much of a judgment of the District Court (Robert P. Patterson, Jr., D.J.) as granted summary judgment dismissing the FLSA claims.[4]

The Second Circuit, affirmed the District Court's dismissal of petitioner's other claims holding they were foreclosed by his failure to arbitrate them under the union contract procedure or employ the grievance procedures in his union's collective bargaining agreement.

GROUNDS FOR THIS COURT'S JURISDICTION

The Court has jurisdiction in this case pursuant to 28 U.S.C. 1251(1). The Second Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

STATUTORY AND RULE PROVISIONS INVOLVED

This petition involves Rule 8(c), Rule 15(a), Rule 56 of the Federal Rules of Civil Procedure.

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[2] Under Court Rule 30.1 this filing is timely as the 90th day following the denial of en banc review was October 16, 1995.

[3] Hon. Frank A. Kaufman of the District of Maryland was sitting by designation.

[4] Tran v. Tran, supra, 847 F. 2d 306 (S.D.N.Y. 1994).

STATEMENT OF THE CASE

Petitioner Tho Dinh Tran prays that a writ of certiorari issue to the United States Court of Appeals of the Second Circuit to review the judgment affirming the dismissal of his state law and common law claims, affirmed the denial of a motion to amend the complaint to assert such claims under the §301 of the Labor and Management Relations Act and remanded the case so that petitioner may pursue his "wage and hour" claims under the Fair Labor Standards Act.

The Circuit found "[t]he undisputed facts indicate that [petitioner] is a Vietnamese immigrant who entered the United States under the sponsorship of [Respondents Dinh Truong Tran, The Alphonse Hotel Corp. d/b/a The Carter Hotel, [Jude] Hotel Corp. d/b/a The Hotel Kenmore]." (See, Appendix "B" at A3.).

The Circuit, relying on this Court's holding in **Barrentine v. Arkansas-Best Freight System, Inc.**, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), held: "In light of **Barrentine** and its renewed vitality under **Gilmer**[5], this Court hereby reverses the holding below of the District Court as set forth in the latter's March 3, 1994, 'opinion that the plaintiff was required to exhaust his arbitral remedy prior to filing' his FLSA claims. Tran v. Tran, [supra] 847 F. Supp. at 309. Accordingly, the within case is hereby remanded to that court for further proceedings pursuant to this opinion in connection with plaintiff's FLSA

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[5] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed. 2d 26 (1991)

contentions." Tran v. Tran, supra, 54 F. 3d at 117.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

The District Court, in its first opinion of August 17, 1993 dismissed petitioner's state law and common law claims asserting:

"Both section 15 of the 1981 CBA and section 26 of the 1985 CBA require arbitration of all disputes between the defendant employers, who are signatories of the CBAs, and employees of the defendants who are members of the Union.

There is no dispute that plaintiff did not attempt to grieve or to arbitrate his disputes with defendants as required by the 1981 and 1985 CBAs...Instead, on October 10, 1991, [petitioner] filed suit in Federal Court to recover back wages and punitive damages from defendants." Tran v. Tran, supra, 860 F. Supp. at 93-94.

The District Court summarized petitioner's litigation as follows:

" In his first claim for relief, which alone is brought under the FLSA, 29 U.S.C. Sec. 206-207, plaintiff claims that he 'performed work, labor and services for which work schedules and rates of pay are provided for in the' [Collective Bargaining Agreements (CBAs)], but that 'Defendants have never paid plaintiff at any time in conformity with those schedules and rates of pay.'...

Specifically, plaintiff claims that defendants intentionally

failed to pay any wages to plaintiff other than room, board and food for the period March 1982 to August 1985, made only partial payments to plaintiff from September 1987 to August 1990, and failed to pay any wages from September 1990 to July 1991... Plaintiff also alleges that he is entitled to recover for 'vacation and holiday time or pay' which defendants were obligated to pay him 'under the Collective Bargaining Agreement.'[6]

In his second amended claim for relief, plaintiff claims that in December 1988 defendants promised plaintiff to pay all his back wages from 1982 if he resumed working for defendants, but that defendants failed thereafter to pay plaintiff his back wages and pay...

In his third claim for relief, plaintiff further claims that defendants' promises to pay him his back wages and full pay thereafter if he returned to work for them constitute fraud because at the time these promises were made defendants had no intention of abiding by them...

In his fourth claim for relief, for unjust enrichment, plaintiff claims that 'Defendants have unjustly reaped the benefits from the work, labor and services performed for them by the plaintiffs [sic].'

In the fifth claim for relief, plaintiff alleges that defendants breached the CBAs by failing to pay plaintiff the wages owed him under the CBA, and by requiring 'plaintiff to work longer hours than permitted under the Collective

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[6] These claims are the claims subject to the remand which will be tried in the District Court under the Court of Appeals' ruling.

Bargaining Agreement, and impos[ing] harsh working conditions on plaintiff which were prohibitede by the Collective Bargaining Agreement.'

Finally, count six of the amended complaint claims that defendants violated New York Labor Law Sec. 198." Tran v. Tran, supra, 860 F. Supp. At 94.

The District Court held that petitioner was bound to arbitrate his state law and common law claims under the CBA and dismissed those claims and granted defendants' motion for summary judgment. Tran v. Tran, supra, 860 F. Supp. at 95-96. The District Court continued to dismiss a portion of petitioner's FLSA claims and ordered further briefing on the issue of whether the remaining FLSA claims were subject to the CBAs' arbitration clause. Id. at 96.

The District Court, in its Second opinion of March 3, 1994 dismissed petitioner's remaining FLSA claims.

The District Court stated: "[i]n this action against defendants for failure to pay back wages, plaintiff...moves pursuant to Rule 15 of the Federal Rules of Civil Procedure for leave to file a Second Amended Complaint to add a cause of action under the Labor Management Relations Act Sec. 301, U.S.C.A. Sec. 185(a). His original Verified Complaint and his Amended Verified Complaint alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Sec. 206-207, breach of contract, fraud and unjust enrichment."

By opinion and Order dated August 13, 1993, this Court granted defendants' motion for summary judgment with respect to each of plaintiff's state and common law claims on

the grounds that the applicable collective bargaining agreement ("CBA") covering plaintiff's employment contained a valid arbitration clause requiring plaintiff to pursue the remedy of arbitration before bringing state and common law claims in Federal Court. In addition, this Court ordered both parties to submit briefs on whether plaintiff's remaining cause of action for violation of the FLSA also required plaintiff to have sought relief in arbitration. The defendants submitted a brief in compliance with the order of August 13, 1993. Plaintiff defaulted and then moved for leave to file a second amended complaint." Tran v. Tran, 840 F. Supp. at 307-308.

The District Court, after gain reviewing the factual claims and again quoting the arbitration clause in the CBA, dismissed the remaining FLSA claims holding that the petitioner was required to arbitrate. Tran v. Tran, 840 F. Supp. at 309 (citations omitted).[7]

Respondent's Unclean Hands

Respondents, are dominated and/or controlled by Dinh Truong Tran, Tran's management of his business, and treatment of his employees and the guests of his hotels are matters which have been both noted in the public press and been the subject of findings of fact in the District Court, albeit not in this case.

Tran's Jude Hotel Corporation, in the case United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 143-147 East 23rd Street,

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[7] It is this specific holding that the Court of Appeals found to be in error and it was as to this ruling that the Court of Appeals reversed.

New York, New York, Listed as Block 879, Lot 27 Which Includes The Kenmore Hotel, 888 F. Supp. 560 (S.D.N.Y. 1995), was caused to forfeit that property because of rampant and uncontrolled sale and use of crack cocaine on the premises. The District Court noted that Dinh Truong Tran had utterly refused to cooperate with authorities, refused to pay security guards working on the premises[8], paid such security personnel as did work $28 per day[9] and failed to cooperate with law enforcement so as to attempt to stem the crack trafficking.[10]

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[8] "Although Jude Hotel intermittently employed some uniformed security guard services in 1993 and 1994, these services terminated their work at the Kenmore Hotel because of Truong's failure to pay them." 888 F. Supp. at 582.

[9] "In lieu of uniformed security guards, Truong hired tenants from the Kenmore Hotel and from the Carter Hotel, another of Truong's properties, paid them only $28 per eight-hour shift, and failed to provide them with uniforms or training." 888 F. Supp. at 582.

[10] "Jude Hotel did virtually nothing to improve conditions. This was not for lack of notice. In November 1992, the Manhatten District Attorney's Office requested a meeting with Truong to discuss a strategy to combat drug trafficking at the Kenmore. In February 1993, La Tran, one of Truong's associates, met with Assistant District Attorney Anne Rudman, who advised him that the Hotel Kenmore was being used to facilitate drug trafficking and urged him to take reasonable steps to try to stop the drug activity, such as hiring full-time uniformed security guards, screening perspective tenants, using a surveillance camera, providing a photo identification card for tenants, and considering hiring a temporary management team to take over the hotel and clean it up.

Petitioner asks the Court to take note of the findings of the Hon. Milton Pollack and to give them such weight as is appropriate in considering the equities which weigh against respondent's efforts to belatedly finding refuge behind the CBA to rob petitioner of redress.

STATEMENT OF THE FACTS

1. Summary of Allegations in Amended Complaint

Respondent Dinh Truong Tran prevailed upon petitioner to adopt the name "Tran" so as to facilitate petitioner's entering America. Petitioner, in exchange for sponsorship, entered an agreement with respondents' that he would work for respondent if he came to this Country and that he would be working 116 hours per week for room and board. Petitioner entered this Country in 1982 and commenced work two (2) days after his arrival at respondents' Hotel Carter. Petitioner was employed there without salary and he worked there in violation of The Industry-Wide Collective Bargaining Agreement to which respondents were bound under as party to that agreement.

ADA Rudman also asked Tran to sign a form affidavit authorizing the NYPD to patrol all the floors and arrest trespassers, which Tran did not sign. These recommendations were subsequently memorialized in a letter to Tran dated February 25, 1993, which also informed Tran that officials would seek assistance from the federal government in bringing an action pursuant to the federal forfeiture laws in the event that his cooperation was not forthcoming.

In spite of the warnings, the [Truong] did not take any significant steps along the lines suggested..." 888 F. Supp. at 582.

Petitioner, who was initially ignorant that he had become a union member after thirty (30) days continous employment by operaiton of The Industry-Wide Collective Bargaining Agreement, began demanding wages on or about November 19, 1985. Respondents, upon being confronted with petitioner's claim and demands promised to pay back wages and back overtime and further promised a $300 per week salary but failed to pay any back wages and only sporadically paid petitioner various sums, none of which were the agreed salary or back pay. Respondents' promises were made without the intent of carrying them out and to lull petitioner.[11]

2. Summary of Proceedings in the District Court

This case was commenced by the filing of a Summons and Verified Complaint in the District Court on October 10, 1991. Respondents filed an Answer with Counterclaims on December 4, 1991 and pleading was completed, at this stage, with appellant's Reply to the counterclaim on December 7, 1991. Respondents original answer did not affirmatively plead arbitration as required by Federal Rule 8. Petitioner filed an Amended Verified Complaint on July 31, 1992 which Appellee answered on December 28, 1992.

Petitioner, in the course of the first year of this action, obtained the entry of no fewer than three (3) show cause orders relating to discovery in this action and to parallel proceedings relative to the same subject matter brought by respondents in the State Courts against petitioner and against

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[11] This conduct is consistent with the conduct found by Senior District Judge Pollack in the forfeiture matter where Dinh Truong Tran would appear to negotiate or would take ineffective action to "buy time".

petitioner's counsel. Respondents, nearly one (1) year after this was filed, changed counsel. Respondents, after new counsel entered the case, continued to extensively and intensively litigate, conducting of depositions, propounding demands for documents and interposing interrogatories and responses. A motion practice was conducted with respect to discovery and with respect to respondents' counterclaims which culminated in a motion for summary judgment filed on June 1, 1993, eighteen (18) months after this case commenced and over a year after parallel State-Court proceedings were discontinued. Respondents' motion was, in part, granted on August 17, 1993. See, Tran v. Tran, 860 F. Supp. 91 (S.D.N.Y. 1993).

Petitioner then moved for leave to further amend the complaint and that motion was denied and petitioner's remaining claim was dismissed. See, Tran v. Tran, 847 F. Supp. 306 (S.D.N.Y. 1994).

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to clarify the impact of failing to plead an affirmative defense which would limit or exonerate a defendant's liability. See, e.g., Taylor v. United States, 108 S. Ct. 1300 (1988), Mr. Justice White dissenting indicated the existence of a conflict among the Circuits.

The Court should grant the writ to determine the important question of whether an employer's conduct can constitute a waiver of the right to compel arbitration under the collective bargaining agreement.

The Court should grant the writ in this instance to

resolve the issue of whether an employer may waive its right to compel arbitration by failing to promptly assert that right in its original answer and then by a prompt motion to compel arbitration.

The Court should grant the writ in this case to determine whether, as a doctrinal issue, an employee may not be required to arbitrate claims made under the FLSA while being compelled to arbitrate non-FLSA claims.

The Court should grant the writ in this case to determine the issue of whether a party's engaging in substancial litigation going to the merits constitutes a waiver of the right to compel arbitration.

The Court should grant the writ to determine the extent to which the Circuit Courts are bound by stare decisis in determining issues of waiver, i.e., whether a Circuit Court may simply avoid its own ample precedent by passing over that on-point precedent in silence.

The Court should grant the writ in this case to determine whether the proposition that an aggrieved employee should not be left without a remedy is satisfied by a collateral litigation for malpractice against an attorney.

ARGUMENT

PETITIONER'S CLAIMS SHOULD NOT BE FORECLOSED BECAUSE HE DID NOT EMPLOY THE COLLECTIVE BARGAINING AGREEMENT'S GRIEVANCE PROCEDURES OR ARBITRATE THOSE CLAIMS.

The Court of Appeals is incorrect in asserting that petitioner did not discuss whether the dispute which underlies this litigation is subject to arbitration in the Court of Appeals and in the Disrict Court. Petitioner has not sought to claim that this dispute was not subject to arbitration and does not seek to claim that he sought to arbitrate this dispute. Respondents, by litigating this dispute, made the issue of whether this dispute was arbitrable irrelevant. Petitioner's claim, advanced in the District Court and in the Court of Appeals, was that by (1) failing to affirmative plead arbitration under Federal Rule of Civil Procedure 8(c) respondents waived arbitration; (2) that respondents failure to move to compel arbitration waived arbitration; and (3) that petitioner and respondents conducting protracted litigation on the merits waived arbitration.

The parties agreement to arbitrate disputes is not absolute. That agreements to be construed in the context of the conduct of the parties to the agreement. The relative standing and position of the parties, their relative sophistication and pattern and practice is vital in apportioning burdens and duties. In the instant case the Court is faced with a totally sophisticated, unscrupulous and unprincipled employer and an employee who had been held to be a virtual slave. Respondents' conduct, as found by the District Court in the Forfeiture Acts, debars their being accorded the benefit of loopholes. Respondents' belatedly claiming that petitioners claims were barred was an extension of their oppressive behavior.

It is well-settled that a party's right to compel arbitration is not unlimited and the right to compel arbitration may be waived by the failure to assert that the dispute must be

arbitrated. Arbitration may also be waived by conducting the litigation in preference to seeking to compel arbitration. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 93 S. Ct. 383 (1973); U.S. Bulk Carriers v. Arguello, 91 S. Ct. 409 (1970) [holding that arbitration is not the exclusive remedy for compensation claims]; Cotton v. Sloane, 4 F. 3d 176, 179 (2d Cir. 1993) (citations omitted); Kramer v. Hammond, 943 F. 2d 176, 179 (2d Cir. 1991) ("...a party waives [arbitration] when he engage[s] in 'protracted litigation' that results in prejudice to the opposing party." Id. (Citations omitted)); Com-Tech Associates v. Computer Associates International, 938 F. 2d 1574, 1576 (2d Cir. 1991); Bowers v. Transportation Maritime Mexicana, S.A., 901 F.2d 258, 263 (2d Cir. 1990); Local 210 Laborers' International Union of North America v. Labor Realtions Divisions Associated General Contractors of America, N.Y.S. Chapter, Inc., 844 F. 2d 69 (2d Cir. 1987) ["'the litigation of substancial issues going to the merits may constitute a waiver of [the right to] arbitration.'" Rush v. Oppenheimer & Co., 779 F. 2d 885, 887 (2d Cir. 1985) (quoting Sweater Bee By Banff, Ltd. v. Manhattan Industries, Inc., 754 F. 2d 457, 461 (2d Cir.), cert. denied, 474 U.S. 819, 106 . Ct. 68, 88 L. ED. 2d 55 (1985)," Id. at 75); Gilmore v. Shearson\American Express Inc., 811 F. 2d 108, 812-813 (2d Cir. 1987) Sweater Bee By Banff, Ltd. v. Manhattan Indus., Inc., 754 F. 2d 457, 461 (2d Cir.), cert. denied, 474 U.S. 819 (1985); Demsey & Associates v. S.S. Sea Star, 461 F. 2d 1009, 1017 (2d Cir. 1972) (Medina, J.); Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044, 1047-48 (S.D.N.Y. 1974).

This court in Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991) stated: "The FAA also provides for stays of proceedings in Federal District Courts

when an issue in the proceeding is referable to arbitration, Sec. 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, Sec. 4. These provisions manifest a 'liberal federal policy favoring arbitration agreements.'" Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983)." 500 U.S. at 25. This Court has indicated that the liberal policy is to be fostered by acting, where appropriate, to compel arbitration. A necessary concomittant to the foregoing is that parties who fail to act to compel arbitration not be permitted to evade actions seeking redress by sleeping on their right to compel arbitration and then raising arbitration as a shield to deprive a party of redress.

Respondents' conduct in this case in the District Court is indisputedly the conduct which this Court and the Second Circuit has found time and time again to be the conduct which compels the conclusion that respondents waived any right to compel arbitration, much less shield themselves from substancial liability by seeking to compel arbitration long after arbitration cannot be had.

a. Respondents Failed to Plead Affirmatively as Required by Rule 8(c) and Waived Arbitration

Federal Rule of Civil Procedure 8(c) states, in pertinent part, "[i]n pleading to a preceding pleading, a party shall set for affirmatively...arbitration..." (emphasis added). The wording of the rule employs a mandatory locution, not a permissive one, and the pleader does not have an option but shall plead arbitration. Appellees' original Answer has six (6) affirmative defenses but arbitration is not among them.

"Since an affirmative defense will defeat plaintiff's claim if it is accepted by the Court, Rule 8(c), by requiring defendant to plead his defense or risk waiving it, also serves the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be barred completely. Named in the rule [is] ... arbitration..." Wright & Miller, Federal Practice and Procedure, §1270 (1994 Ed.). As Professor Wright cogently points out, there are strong policy reasons to require prompt pleading of affirmative matters as, at a minimum, pleading both puts the plaintiff on notice of the defense and prevents the defendant from withholding it and using the defense -- as the respondents did in this case -- to foreclose a claim. It is worthwhile to note that respondents' original Answer, albeit undated, but which must have preceded Petitioner's reply to the counterclaims which is dated December 9, 1991, likely dates from November, 1991. Respondents' Amended Answer, filed well over a year later on December 24, 1992, for the first time asserts arbitration as a defense. Respondents, despite this grossly tardy claim, still did nothing other than assert the defense in their Amended Answer. Respondents did not, in 1992, make a motion either to dismiss, to stay proceedings or to compel arbitration. The parties continued to prosecute the case in the District Court by conducting extensive discovery and an intense motion practice.

The Second Circuit has held that the mere assertion of the defense is insufficient -- a prompt motion must be made. "The Second Circuit held that the pleading of the affirmative defense of arbitration alone may not be sufficient to prevent its waiver. In that case a voyage charterer was impleaded as a third-party defendant in an action for cargo damage. Although it pleaded arbitration as an affirmative defense, it

also answered on the merits, asserted a crossclaim that was answered, and participated in discovery. The Second Circuit held that the right to arbitrate was waived, stating: '[T]he mere existence of an arbitration clause is not such a bar. Jordan [third-party defendant] should have taken one of the steps available to it under the Rules. It could have moved for a stay of the action pending resolution by arbitration of its dispute with World bulk. Pursuant to Rule 14 it could have moved for a severance of the third-party claim and for arbitration of the severed claim. Either course of action would have afforded Jordan protection of its rights in this lawsuit and would have preserved its claim that it was entitled to have certain issues tried by arbitration.'"[12] Wright & Miller, Federal Practice and Procedure, §1278 (1994 Ed.)

By failing to timely plead affirmatively and then promptly move when belatedly pleading, appellees waived arbitration.

b. **By Protractedly Litigating this case in the District Court Respondents Waived Arbitration.**

Litigating a claim waives the ability to compel or to require arbitration. "...a party waives [arbitration] when he engage[s] in 'protracted litigation' that results in prejudice to the opposing party." Kramer v. Hammond, 943 F. 2d 176, 179 (2d Cir. 1991) (citations omitted). The Kramer Court continued:

> **Nevertheless, a party does waive this right when he engages in "protracted**

[12] Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009, 1017 (2d Cir. 1972) (Medina, J.).

> **litigation", that results in prejudice to the opposing party. "[W]aiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur [prejudice]**

Kramer v. Hammond, supra, 943 F.2d at 179 (emphasis added) (citations omitted).

The Second Circuit recently reaffirmed Kramer and all the principles discussed in the cases cited above at pages 6-7 in Cotton v. Sloane:

> We have emphasized that there is a strong presumption in favor of arbitration and that waiver of the right to arbitration 'is not to be lightly inferred.' To avoid waiver, however, it is not enough to merely assert a right without taking appropriate steps to secure it. Waiver will be inferred when a party engaged in protracted litigation that result in prejudice to the opposing party. Sufficient prejudice to infer waiver has been found when a party seeking to compel

> arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense...

Cotton v. Sloane, 4 F. 3d 176, 179 (2d Cir. 1993) (emphasis added) (citations omitted); see also, Helpers & Warehousemen Union of America v. Lawrence-Mercer County Builders Ass'n, 88 F.R.D. 644 (E.D. Pa. 1980) [Failure to plead arbitration as an affirmative defense waived his later claim that appellant was bound to arbitrate this dispute. Fed. R. Civ. Pro. 8(c).

The same result is compelled under the law of the forum. Respondents' litigation of this case indicated a preference for litigation which is "'clearly inconsistent with his [later] claim that the parties were obligated to arbitrate.' (Matter of Zimmerman v. Cohen, 236 N.Y. 15, 19..." Sherrill v. Grayco Builders, 486 N.Y.S. 2d 195, 162 (N.Y. 1985). Respondents, by conduct, waived any right it had to compel appellant to arbitrate after litigating this case to the point where appellant could no longer invoke arbitration. Matter of the City of Yonkers v. Cassidy, 44 N.Y. 2d 784, 785 (1978).

This case was heavily litigated in the District Court for nearly three (3) years. During the course of this litigation petitioner's ability to bring these claims in arbitration lapsed. During these times there was an intense motion practice, there was a substancial discovery practice, including the deposition of respondents, and there were frequent

applications to the District Court with respect to discovery and extensions of the discovery cut-off date.

It was only at 5:15 P.M. on the final cut-off date of discovery that respondents served a summary judgment motion by facsimile on petitioner's trial counsel without having first requested a summary judgment conference before the District Court. Respondents, having slept soundly, suddenly sought the remedy that they should have sought in November 1991. By the time respondents moved for summary judgment in June 1993 they had delayed over one (1) year in pleading arbitration affirmatively and delayed a further six (6) months after belatedly pleading to move for summary judgment.

Respondents, based on the well-settled law in the Second Circuit, should have been held to have waived arbitration by reason of having failed to plead affirmatively, having failed to move expeditiously and by intensely litigating in the manner condemned by Cotton, Kramer and their predecessors.

c. The Court of Appeals Erred in dismissing Petitioner's Non-Wage and Hour Claims

The Court of Appeals held: "With regard to all non-wage hour claims of plaintiff in this litigation, including plaintiff's state and common law claims and plaintiff's attempt to amend his complaint to add a claim under Sec. 301 of the LMRA, the holdings of the District Court are hereby affirmed. Thus, it is the view of this Court that all claims of plaintiff other than those stated under the FLSA should have been the subject of a timely demand under the arbitration clause of the applicable union contract." Tran v. Tran, 54 F. 3d at 118.

The Court of Appeals reads Barrentine and its internal authorities and Gilmer as standing for the proposition that, if one may litigate after unsuccessfully arbitrating, then arbitration is not a condition precedent to a FLSA litigation. The underpining for this reading is that FLSA provides individual rights which ought not be subordinated to the "'collective interest of all employees in the bargaining unit.'" Tran v. Tran, 54 F. 3d at 118 (citation omitted). The Court of Appeals, by making this observation, subordinates petitioner to the larger interest of fostering arbitration under the collective bargaining agreement. The Court of Appeals, again by glossing over the facts of this particular case vitiates any requirement that wage and hour claims be arbitrated.

Gilmer quotes with approval the prior teaching of Mitsubishi: "Of course, the Courts should remained attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi Motors Corp., v. Solar Chrysler-Plymouth, 473 U.S. 626, 627 (1984) (citation omitted), Gilmer, supra, at 32. Gilmer further noted "[t]hus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sec. 2.'" Id.

The Court of Appeals, faced with a situation where the overwhelming economic power of the employer is supposedly balanced by the countervailing power of the labor organization, failed to apprehend that, in this case, the union agreement provided no counterweight to the power or the exercise of improper authority by the employer. The employer was not deterred or affected by the union contract

as he ignored it save when its terms worked to his advantage in attempting to escape liability in this case. Thus, under §2 of the Arbitration Act, the employer's breach of the contract made it inequitable to enforce it against the employee so as to debar his claims.

The Court of Appeals took what might otherwise have been construed this as a purely procedural case. Had the Court of Appeals correctly decided the waiver issue there would be no need to reconstruct Barrentine or construe a private right of action under the FLSA.

If Barrentine is to be read as permitting a party who did not prevail in arbitration to take a second bite at the apple by litigating on the ground that "statutory rights" are involved then it would seem that it is in error (1) to deprive petitioner of a remedy for his non-wage and hour claims; (2) to afford preclusive effect to the (in this case excusable) failure to arbitrate;[13] and (3) declining to permit petitioner to proceed to assert statutory LMRA claims.

PETITIONER, AS A MATTER OF PUBLIC POLICY, SHOULD NOT BE LEFT WITHOUT A REMEDY FOR THE MAJORITY OF HIS DAMAGES

The policy underpinnings of the Fair Labor Standards Act is to eliminate labor conditions detrimental to the general welfare of the worker and to insure working men and women obtain a fair days pay for a fair days work. A. H. Phillips,

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[13] See, Barrentine, supra, 466 U.S. at 285, 288-89 [refusing to grant preclusive effect to an unappealed from arbitration decision].

Inc. v. Walling, 345 U.S. 490 (1945); Fleming v. Warshowsky & Co., 123 F. 2d 622 (7th Cir. 1941). Congress, in the Act, legislated a major enactment of the social and economic policy intended to protect certain groups from substandard wages and excessive hours which endangers the national health. Foremost Diaries Inc. v. Wirtz, 318 F. 2d 653 (5th Cir. 1967), cert. denied, 390 U.S. 946.

The policy goals of the Act cannot be fulfilled by leaving petitioner without a remedy. The facts of this case, the virtual enslavement of petitioner, his working excessive hours at no pay and his having been preyed upon by respondents are just the evils the Act was intended to eradicate. Respondents, by failing to follow the Collective Bargaining Agreement, should not be permitted to use that Act as a shield to protect them from liability. Petitioner, in this case, is seeking to redress a variety of wrongs, some of which come under the Fair Labor Standards Act, some of which are actionable under the Labor and Management Relations Act and some of which are actionable under theories of state law or common law. Petitioner is not made whole by being permitted to litigate his FLSA claims because his claims are more extensive than wage and hour claims.

The District Court and the Court of Appeals both suggest that Petitioner's remedy for his non-FLSA claims, is to bring an action against his trial counsel for having failed to interpose a timely demand for arbitration and file an appropriate grievance. This suggestion that a litigation against counsel is a remedy[14] for the damages suffered by

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[14] See, Tran v. Tran, 54 F. 3d at 118 ["Further, this Court also notes that, as stated by the District Court in the next to last paragraph

petitioner at respondents' hand confuses the policy issues involved. The public policy is that petitioner not be denied a remedy against the offending employer for the misconduct of that employer. The public policy involved seeks to penalize the employer, the actual wrongdoer, and does not contemplate, as a remedy, a collateral proceeding based upon wholly different theories of liability.

CONCLUSION

WHEREFORE, for all of the foregoing reasons and in the interest of justice it is respectfully prayed that a Writ of Certiorari be granted.

Dated: New York, New York
October 15, 1995

Respectfully submitted,

Ronald Cohen
Attorney for Petitioner
Suite 3501
233 Broadway
New York, N.Y. 10279
212-513-1749

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omits March 3, 1994, opinion, plaintiff may also be able to seek relief 'In an action against counsel'"].

APPENDICES

APPENDIX A
(UNPUBLISHED)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of July one thousand nine hundred and ninety-five.

Tho Dinh Tran,

Plaintiff-Appellant,

v.

Dinh Truong Tran, The Alphonse Hotel Corp., d/b/a The Carter Hotels, Jude Hotel Corp., d/b/a The Hotel Kenmore,

Defendants-Appellees

The Alphonse Hotel Corp.,

Counter-Claimant,

v.

Tho Dinh Tran,

Counter-Defendant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by the

appellant Tho Dinh Tran.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
By:
Beth J. Meador
Administrative Attorney

APPENDIX B

(PUBLISHED 54 F. 3d 115)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Tho Dinh Tran,

Plaintiff-Appellant

v.

Dinh Truong Tran, The Alphonse Hotel Corp., d/b/a The Carter Hotels, Jude Hotel Corp., d/b/a The Hotel Kenmore,

Defendants-Appellees

The Alphonse Hotel Corp.,

Counter-Claimant

v.

Tho Dinh Tran,

Counter-Defendant

PLAINTIFF appeals two rulings of the United States District Court for the Southern District of New York (Patterson, J.), granting summary judgment in favor of defendants in connection with certain claims of plaintiff stated under New York state statutory and common law, as well as under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et. seq. In so doing, the district court held, inter alia, that plaintiff had failed to pursue applicable grievance and arbitration procedures under the collective bargaining agreement.

Reversed and remanded, with directions to allow plaintiff to present the merits of certain of plaintiff's FLSA claims without first utilizing grievance and arbitration procedures.

Ronald Cohen, New York, New York, for plaintiff-appellant.

Alan H. Lichtenberg, New York, New York, (Lichtenberg & Ginach, New York, New York) for defendants-appellees.

KAUFMAN, D.J. — The undisputed facts indicate that plaintiff (appellant) is a Vietnamese immigrant who

entered the United States under the sponsorship of defendants (appellees). Plaintiff, a member of a union with which defendants are bound by a collective bargaining agreement, alleges that defendants failed to pay to plaintiff, an employee of defendants between the years 1982-88, wages as required by their contractual undertakings with the plaintiff and by the New York State statutory and common law, as well as under federal statutory command pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et. seq. In addition, plaintiff successfully sought in the district court to amend his complaint to state an additional cause of action under the Federal Labor Management Act (LMRA), §301, 29 U.S.C. §185(a). In an opinion filed Aug. 17, 1993, the District Court granted summary judgment for defendants as to each and all of the state and common-law claims of plaintiff on the grounds that plaintiff had failed to seek to arbitrate those claims. *Tran v. Tran*, 860 F. Supp. 91 (S.D.N.Y. 1993). For the same and other reasons, in

Tran, pl-ap, v. Tran et al.,def-ap.; Alphonse Hotel Corp., cnt-cl v. Tran, cnt-def.
Decided May 5, 1995.
Before Mclaughlin and Jacobs, C.J.J.; and Kaufman, D.J.[1].

an opinion filed March 3, 1994, the District Court dismissed certain of plaintiff's FLSA claims and denied plaintiff's motion for leave to amend his complaint to state a cause of action under §301 of the LMRA.[2] *Tran v. Tran*, 847 F. Supp. 306 (S.D.N.Y. 1994). In that latter opinion, the District Court indicated clearly that defendants had not waived their right to pursue the contention that plaintiff had not appropriately exhausted

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[1] Honorable Frank A. Kaufman, of the United States District Court for the District of Maryland, sitting by designation.

[2] After the District Court rendered its Aug. 17, 1993 opinion and before that Court filed its March 3, 1994 opinion, plaintiff sought arbitration which the union refused to pursue.

the arbitral process.[3]

In the within appeal, plaintiff challenges the District Court's rulings that defendants did not waive arbitration by anything which occurred before or during the course of the litigation before the District Court; that there are disputed facts which should have prevented the District Court from granting summary judgment with respect to some or all of plaintiff's claims; and that plaintiff has been completely deprived of a remedy as a result of

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[3] § 26 of the union contract of June 26, 1985, which was in force and effect in this case provides:

All complaints, disputes, or grievances arising between theparties hereto involving questions or interpretations or application of any clause of this agreement, or any acts, conduct or relations between the parties, directly or indirectly, which shall not have been adjusted by and between the parties involved shall be referred to a permanent umpire to be known as the Impartial Chairman, and his decision shall be final and binding upon the parties hereto. Any such complaint, dispute, or grievance involving an EMPLOYER member of the ASSOCIATION shall in the first instance, be submitted to the Labor Manager who will be appointed and employed by the ASSOCIATION to consider and adjust with a duly accredited representative of the UNION, for their joint consideration and adjustment; if they agree, such decision shall be binding on the parties hereto. Should the matter not be resolvedby the Labor Manager and the representative of the UNION, it shall then e referred to the Impartial Chairman as aforesaid.

the totality of the District Courts rulings.

While the plaintiff, in several briefs filed in this Court, has argued that defendants waived arbitration, plaintiff has not, in such briefs, specifically faced the issue of whether or not he was required to seek arbitration, under the collective bargaining agreement, of his FLSA claims before seeking relief under that Act in this case. However, that question was explicitly raised by the District Court in its Aug. 17, 1993 opinion, and counsel were asked in that opinion to submit memoranda addressing the issue of whether certain claims under the FLSA were subject to prior arbitration.[4] Subsequently, the District Court held that plaintiff had failed to utilize the required arbitration procedure. Accordingly, in this appeal, we reach the question of whether plaintiff was so required to seek arbitration before proceeding to present, in the District Court, the merits of his FLSA claims. For the reasons

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[4] The court below, in its Aug. 17, 1993 opinion, ordered both parties to file memoranda of law concerning certain of the FLSA issues. Defendants complied; plaintiff, however, simply moved to amend his complaint to include a§301 claim without briefing the FLSA-arbitration question.

set forth in this opinion, we reverse and remand.

I

In *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728 (1981), Justice Brennan, writing for himself and six other members of the Supreme Court, concluded that the fact that the plaintiffs had unsuccessfully submitted their claims for violations of the FLSA, pursuant to the grievance and arbitration provisions of the applicable union contract, did not preclude those employees from subsequently pressing their FLSA claims in Federal District Court. In *Barrentine*, the Supreme Court wrote that the LMRA "was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*," 450 U.S. at 739 (emphasis in original), while "the FLSA was designed to give specific minimum protection to *individual* workers." Id. at 739 (emphasis in original). Also, in *Barrentine*, Justice Brennan included a reference, by way of a "Cf." to *U.S. Bulk Carriers Inc. v. Arguelles*, 400 U.S. 351, 357 (1971): "(seaman may assert wage claim in federal court under the Seaman's Wage Act, 46 U.S.C. §596 [46 USCS §596], even though he had not previously

pursued arbitral remedies provided by contractual grievance procedures)." *Barrentine*, 450 U.S. at 738, n.12. In *Arguelles*, Justice Brennan and two other members of the Court joined Justice White's dissent to the majority opinion in that case, written by Justice Douglas on behalf of himself and four other members of the Court. In so doing, the dissenters explained the view that nothing in the underlying statute justified non-use of the grievance and arbitration procedures of the underlying union contract. *Arguelles*, 400 U.S. at 374. In *Barrentine*, Justice White was one of the members of the Court who joined in Justice Brennan's majority opinion. The District Court in this litigation, in its March 3, 1994 opinion, assigned what amounts to a narrow reading of *Barrentine*, citing to and relying upon *Steele v. L.F. Rothchild & Co.*, 701 F. Supp. 407, 408 (S.D.N.Y.) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)), appeal dismissed, 864 F. 2d 1 (2d Cir. 1988) and *Marshall v. Coach House Restaurant Inc.*, 457 F. Supp. 946 (S.D.N.Y. 1978). See *Tran v. Tran*, 847 F. Supp. at 309. However, in this Court's view, *Barrentine* may not be so read. In *Barrentine*, the Supreme Court reversed the determination of the District Court, which had been

affirmed by the Eighth Circuit, even after the grievance and arbitration procedures had been unsuccessfully utilized by the plaintiffs, and held that the Federal District Court should still reach the merits of the plaintiffs' federal wage hour claims. See 450 U.S. at 745-46. Subsequently, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), Justice White, writing for himself and six other members of the Court, with a dissent by Justice Stevens, joined in by Justice Marshall, emphasized that in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), "the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action," *Gilmer*, 500 U.S. at 33-34, and that *Gardner-Denver* related to a situation in which the "'interest of the individual employee may be subordinated to the collective interests of employees in the bargaining unit'" Id. at 34 (citing Gardner-Denver, 415 U.S. at 58, n.19). By way of contrast, Justice White noted that *Barrentine* and *McDonald v. West Branch*, 466 U.S. 284 (1984), raised statutory claims involving principally "individual statutory rights." *Gilmer*, 500 U.S. at 35. There is nothing in

Gilmer which appears to throw anything but favorable light upon the continuing authority of *Barrentine*. As to *McDonald*, it deals with a claim under 42 U.S.C. §1983. Therein Justice Brennan wrote: "The question presented in this §1983 action is whether a Federal Court may accord preclusive effect to an unappealed arbitration award in a case brought under §1983 ." 466 U.S. at 285. Citing to and discussing *Gardner-Denver* and *Barrentine*, Justice Brennan answered the above set forth question in the negative, and in so doing, reversed the Sixth Circuit's contrary view. Id. at 288-89.

In the light of *Barrentine* and its renewed vitality under *Gilmer*, this Court hereby reverses the holding below of the District Court as set forth in the latter's March 3, 1994, opinion "that the plaintiff was required to exhaust his arbitral remedy prior to filing" his FLSA claims. *Tran v. Tran*, 847 F. Supp. at 309. Accordingly, the within case is hereby remanded to that court for further proceedings pursuant to this opinion in connection with plaintiff's FLSA contentions.

II

With regard to all non-wage hour claims of plaintiff

in this litigation, including plaintiff's state and common-law claims and plaintiff's attempt to amend his complaint to add a claim under §301 of the LMRA, the holdings of the District Court are hereby affirmed. Thus, it is the view of this Court that all claims of plaintiff other than those stated under the FLSA should have been the subject of a timely demand under the arbitration clause of the applicable union contract. But in so far as the wage hour claims of plaintiff are concerned, plaintiff was not required to seek grievance and arbitration and was and is entitled to have those claims considered on the merits in the District Court. In that latter regard, it is noted, however, that in its Aug. 17, 1993, opinion, the District Court specifically considered the merits of certain of plaintiff's claims under the Fair Labor Standards Act and entered rulings with regard to them on grounds other than those related to arbitration. See *Tran v. Tran*, 860 F. Supp. at 96. Those determinations by the District Court are hereby affirmed.

III

In the light of this Court's within opinion and its reliance upon *Barrentine* and *Gilmer*, plaintiff will now

have the opportunity to proceed on the merits in the court below in connection with certain of plaintiff's wage-hour claims, despite the refusal, discussed supra, in this opinion, of the union to demand arbitration of the merits of any of plaintiff's contentions in the litigation because of the lapse of time. Further, this Court also notes that, as stated by the District Court in the next to the last paragraph of its March 3, 1994, opinion, plaintiff may also be able to seek relief "in an action against counsel."

Reversed and remanded for further proceedings in the District Court in accordance with this opinion.

APPENDIX C
(PUBLISHED 847 F. SUPP. 306)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THO DINH TRAN,

Plaintiff,

-against-

DINH TRUONG TRAN and THE ALPHONSE HOTEL CORP. d/b/a THE CARTER HOTELS, and JUDE HOTEL CORP., d/b/a THE HOTEL KENMORE,

Defendants.

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91 Civ. 6818 (RPP)
OPINION AND ORDER

APEARANCES

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By: Daniel M. Isaacs, Esq.

ROBERT P. PATTERSON, Jr., U.S.D.J.

In this action against defendants for failure to pay back wages, plaintiff Tho Dinh Tran "(Tran") moves pursuant to Rule 15 of the Federal Rules of Civil Procedure for leave to file a Second Amended Complaint to add a cause of action under the Labor Management Relations Act § 301, 29 U.S.C.A. § 185(a).[1] His original Verified Complaint and his Amended Verified Complaint alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206-207, breach of contract, fraud and unjust enrichment.

By Opinion and order dated August 13, 1993, this Court granted defendants' motion for summary judgment with respect to each of plaintiff's state and

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[1] In addition, the plaintiff's proposed Second Amended Verified Complaint would withdraw his demand for punitive damages as well as his claim for relief under New York State Labor Law §198, which had been added in his First Amended Verified Complaint.

common law claims on the ground that applicable collective bargaining agreement ("CBA") covering plaintiff's employment contained a valid arbitration clause requiring plaintiff to pursue the remedy of arbitration before bringing state and common law claims in Federal Court. In addition, this Court ordered both parties to submit briefs on whether plaintiff's remaining cause of action for violation of the FLSA also required plaintiff to have sought relief in arbitration. The defendants submitted a brief in compliance with the order of August 13, 1993. Plaintiff defaulted and then moved for leave to file a second amended complaint.

For the reasons set forth below, plaintiff's FLSA claim is dismissed and plaintiff's motion for leave to file a second amended complaint is denied.

BACKGROUND

As set forth more completely in this Court's Opinion and Order of August 13, 1993, the following are among the facts in this case. Defendant Dinh Truong Tran ("Truong") is the President and major stockholder of defendants Alphonse Hotel Corp. d/b/a the Carter Hotels and Jude Hotel Corp. d/b/a the Hotel Kenmore, and exercises control over the daily operations and

management of each hotel. Amended Complaint ¶¶ 12-13. In March 1982, plaintiff Tran emigrated to the U.S. under the sponsorship of Truong. Def.'s Rule 3(g) Statement ¶ 4. Shortly after his arrival, Tran began working for the Hotel Carter under Truong's supervision at a rate of $300 per week, plus room and board. Id. Tran alleges he worked for the Hotel Carter from 1982 until "on or about" June 1988 when he quit. Pl.'s Amended Complaint ¶ 25. Tran asserts that upon Truong's promise to pay plaintiff's claim for back wages, Tran resumed work for defendant hotels in December 1988 and continued until July 1991, when he quit for a second and final time. Id. ¶¶ 27, 30. In his complaint, Tran claims he did not receive any weekly pay until 1985, and after that only sporadically. Id. ¶¶ 20-22. Suit was brought in this Court on October 10, 1991, to recover the back pay allegedly owed to Tran.

The defendant hotels are members of the Hotel Association of New York City, Inc. ("Association"), which entered into a CBA ("1981 CBA") with the New York Hotel and Motel Trade Council, AFL-CIO ("Union") on March 17, 1981. A subsequent CBA ("1985 CBA"), entered into by the Association and the Union on June 26, 1985, superseded the 1981 CBA. The plaintiff

became a beneficiary under the 1981 CBA 30 days after he began his employment with the defendant hotels. 1981 CBA at 3; Amended Complaint § 56. Indeed, Tran claims that at least as of "late April 1982" he was a member of the Union. Plaintiff's Rule 3(g) Statement in Opposition ¶¶ 16-17. There is no dispute that Plaintiff was subject to the 1981 and 1985 CBAs, including their provisions on grievance procedures. 1981 CBA ¶ 15; 1985 CBA ¶ 26. The relevant provision in both CBAs reads as follows:

COMPLAINTS, GRIEVANCES AND ARBITRATION

All complaints, disputes or grievances arising between the parties hereto involving questions or interpretation or application of any clause of this Agreement, or any acts[,] conduct or relations between the parties, directly or indirectly, which shall not have been adjusted by and between the parties involved shall be referred to a permanent umpire to be known as the Impartial Chairman, and his decision shall be final and binding upon the parties hereto. Any such complaint, dispute or grievance involving an Employer member of the Association shall in the first instance, be submitted to the Labor Manager who will be appointed and

employed by the Association to consider and adjust with a duly accredited representative of the Union, for their joint consideration and adjustment; if they agree, such decision shall be binding on the parties hereto. Should the matter not be resolved by the Labor Manager and the representative of the Union, it shall then be referred to the Impartial Chairman as aforesaid. 1981 CBA ¶ 15; 1985 CBA ¶ 26.

Six days after this Court's Opinion and Order of August 13, 1993, which dismissed plaintiff's state and common law claims, plaintiff invoked this section of the CBAs by a letter from counsel demanding that the Union arbitrate plaintiff's claim for back wages. Pl.'s counsel Aff't in Support, Exh. D. After receiving a letter from the Union dated September 17, 1993, denying his request, plaintiff filed this motion for leave to file a second amended complaint.

Discussion

A. Applicability of Arbitration to FLSA Claim

Although plaintiff did not file a brief responsive to the Court's Order of August 13, 1993, it is clear that, as with his other claims, he was required to exhaust his

remedy in arbitration before bringing a FLSA claim in this Court. Federal Law requires the enforcement of agreements to arbitrate unless the party opposing arbitration can show "either from the statute's text or legislative history or from 'an inherent conflict between arbitration and the statute's underlying purpose'" a Congressional intent "to preclude a waiver of the judicial forum." Steele v. L.F. Rothchild & Co. Inc., 701 F. Supp. 407, 408 (S.D.N.Y.) (quoting Shearson/American Express, Inc. V. McMahon, 482 U.S. 220,227 (1987)) appeal dismissed, 864 F.2d 1 (2d Cir. 1988). Steele held that a congressional intent to preclude a waiver of the judicial forum did not exist with respect to the FLSA, at least as far as concerns the 1976 Equal Pay Act amendment to the FLSA, 29 U.S.C. § 206(d), addressing wage discrimination on the basis of sex. Id.

Similarly, in Marshall v. Coach House Restaurant, Inc., 457 F. Supp. 946 (S.D.N.Y. 1978), a dispute involving overtime pay levels, the Court concluded that the policy behind binding arbitration made much more sense in the context of rate of pay disputes than, for example, racial discrimination claims because "...rate of pay issues, although statutory in origin, neither require nor lend themselves to 'public law considerations.'" Id.

at 950. The Court also concluded "that Congress ha[s] manifested no preference for the resolution of wage disputes in the judicial forum," Id., and that allowing employees to bypass previously agreed upon grievance procedures in order to bring rate of pay claims in Federal Court would be disruptive in that "'wages and hours are at the heart of the collective bargaining process.'" Id. (quoting Satterwhite v. United Parcel Service, Inc., 496 F.2d 448, 451 (10th Cir.), cert. denied, 419 U.S. 1079 (1974)).

The sole basis of Tran's FLSA claim, as with his other claims, is that his former employers owe him back wages. Since this claim clearly implicates rate of pay issues, the plaintiff was required to exhaust his arbitral remedy prior to filing that claim in this Court.

B. The Motion for Leave to Amend

Under rule 15 of the Federal Rules of Civil Procedure, leave to amend pleadings "shall be freely given when justice so requires." The Supreme Court has recognized that leave should be liberally given except in cases of:

undue delay, bad faith, or dilatory motive on the

part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.

Foman v. Davis, 371 U.S. 178, 182 (1962). The futility of plaintiff's motion for leave to amend his complaint will be addressed hereafter.

In his proposed Second Amended Complaint, despite the Court's Opinion and Order of August 13, 1993, plaintiff reasserts his state and common law claims as well as his FLSA claims and adds a claim under section 301 of the Labor Management Relations Act ("LMRA"). The state and common law claims should not have been repleaded. There is a clear precedent that the LMRA preempts such claims when, as in the proposed complaint, they are based on rights established by a collective bargaining agreement. Paul McKee v. Transco Products, Inc., 874 F.2d 83 (2d Cir. 1989); Walker v. Columbia University in the City of New York, 756 F. Supp. 149, 152 (S.D.N.Y. 1991). Indeed, recognizing the holding in Paul McKee, the plaintiff as much as acknowledges the preemption of these claims

in his supporting memorandum. Pl. Mem. at 3.[2]. Accordingly, only plaintiff's claim under Section 301 need be examined.

As stated in Steele and Marshall, supra, and in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 163-164 (1983), employees must normally exhaust arbitral remedies before initiating Section 301 claims against their employers in Federal Court. Plaintiff relies on the holding in Vaca v. Sipes, 386 U.S. 171, (1967), that, despite the above requirement, an employee may institute suit against his employer if the employee "has been prevented from exhausting his contractual remedies by the Union's wrongful refusal to process the grievance." Id. at 85, S. Ct. at 914 (emphasis in original). Plaintiff also relies on the holding in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976), that under Section 301 of the LMRA employees may resort to the courts if the union engaged in hostile, discriminatory or arbitrary actions.

The so-called Vaca-Hines test requires two

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[2] Somewhat inconsistently, the reply affidavit of the plaintiff's counsel expressly does not concede that the LMRA preempts plaintiff's state and common law claims.

findings in order for there to be a breach of a union's so-called duty of fair representation when deciding whether to arbitrate on behalf of an employee. First, the union's refusal to arbitrate must be "arbitrary, discriminatory or in bad faith" in refusing to arbitrate, Vaca, 386 U.S. at 190, and second, the refusal must "seriously undermine the arbitral process." Camporeale v. Airborne Freight Corp., 732 F. Supp. 358 (E.D.N.Y. 1990) (quoting Hines, 424 U.S. at 567). Cf. Barr v. United Parcel Service, Inc., 868 F. 2d 36, 43 (2d. Cir. 1989) (applying the Vaca-Hines test and finding no breach of union's duty in suit against employer and union by former employee for wrongful discharge).

Plaintiff asserts that the two-pronged Vaca-Hines test is satisfied here because (1) "the Union was made aware of the unfair practices of defendants back in 1985"; (2) the Union "never investigated although informally requested to do so"; (3) the Union was "again informed about the continuation of the defendants' unfair trade [sic] practices in mid-1992" but "again failed to investigate and, more importantly, failed to assist plaintiff in any manner, requiring counsel for plaintiff to subpoena the Union to obtain cooperation"; and (4) the

Union "formally refused arbitration in a perfunctory manner." Pl. Mem. at 5-6.[3].

None but the last of plaintiff's allegations would amount to a breach of the Union's duty of fair representation under the Vaca-Hines test. That test relates to a union's duty to represent employees fairly in refusing to arbitrate or while engaged in the arbitral process. The allegations of plaintiff's counsel, however, relate to fair representation of employees in the labor/management context. In order for the plaintiff to allege a Union breach of the duty of fair representation under Vaca-Hines, plaintiff is required to have made a direct request of the Union to invoke the grievance procedures on his behalf. See Flanigan v. IBT, Truck Drivers Local 671, 942 F. 2d 824, 829 (2d Cir. 1991) (because employees/appellants did not ask union to process their grievance, they cannot complain that the union breached its duty of fair representation).

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[3] With respect to this last allegation, since plaintiff's demand for arbitration in August, 1993 was based on activities from 1982 to July 1991, the Union official involved concluded that the delay in making the demand would have led to an adverse arbitral decision, as had another wage claim the Union had recently sought to arbitrate. Kellett Aff't. ¶ 11 and Exh. D.

By his own admission, plaintiff's counsel did not do this until August 19, 1993. Accordingly, the issue before this Court is whether that request constituted a timely demand on the Union permitting plaintiff to assert a claim under Section 301 of the LMRA. Only if the demand was timely could plaintiff reasonably argue that the Union's refusal to arbitrate was "perfunctory" in nature.

Although brought only against the employers and not the Union, plaintiff's claim constitutes a hybrid action under Section 301 of the LMRA. DelCostello, 462 U.S. at 164-65; Paul McKee, 874 F. 2d at 86. In such actions a six-month statute of limitations borrowed from Section 10(b) of the National Labor Relations Act applies. DelCostello at 169-171. A plaintiff/employee, as a union member, is presumed to be familiar with internal grievance procedures set forth in the union constitution or CBA. See, e.g., Wozniak v. U.A.W., Local 897, 842 F. 2d 633, 636 (2d. Cir. 1988) (knowledge of internal grievance procedure contained in the union constitution is imputed to employee against employer and union; suit is precluded because internal appeals process was not exhausted). In this case the plaintiff's knowledge of the CBAs is more than just an

inference. In his initial complaint, filed on October 10, 1991, the plaintiff invoked the CBAs and purported to annex a copy of the 1981 CBA as Exhibit A. Pl.'s Verified Complaint at 4.[4] Accordingly, plaintiff and his counsel had knowledge of the CBAs in October 1991 and chose nonetheless to proceed directly in Federal Court rather than invoke the CBAs' arbitral process. Moreover, the defendants' Answer to Amended Complaint, filed December 28, 1992, put plaintiff on explicit notice that arbitration was his sole and exclusive remedy under the CBAs. Answer to Amended Complaint ¶ 70.

This is not a situation where the discovery process brought to the plaintiff's attention a new cause of action. Instead, the only conclusion to be reached is that, at the time of the filing of this suit in October 1991, plaintiff was more interested in recovering attorney's fees than in invoking the grievance procedures in which the Union

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[4] The copy so annexed omitted the grievance section which appears on pages 18-19. In the plaintiffs subsequent motion to file an amended complaint this omission was neither corrected nor brought to the Court's attention in any manner. In each of the complaints, plaintiff sought an award of reasonable attorneys fees as allowed under the FLSA. 29 U.S.C. § 216 (b).

would represent the plaintiff. To allow plaintiff to avoid the arbitral process by proceeding in the manner he chose in this case would be to encourage other parties to bring lawsuits, causing disruptions or circumvention of CBA grievance procedures, and would frustrate Congress's intent to encourage resolution of disputes by arbitration.

It is unfortunate for plaintiff Tran that his counsel's proceeding in this Court has caused, due to the lapse of nearly two years since the events complained of last occurred, the Union to refuse to demand arbitration and that his counsel's delay in demanding arbitration has resulted in a time bar to plaintiff's Section 301 claim. Relief may be possible, however, in an action against counsel for proceeding in the manner chosen.

CONCLUSION

For the foregoing reasons, the plaintiff's claim under the Fair Labor Standards Act is dismissed and his motion for leave to file a second amended complaint is denied since to permit its filing would result in an exercise of futility. This case is closed.

IT IS SO ORDERED

Dated: New York, New York
March 3, 1994

Robert P. Patterson, Jr., U.S.D.J.

APPENDIX D

(PUBLISHED 860 F. SUPP. 91)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THO DINH TRAN,

Plaintiff,

-against-

DINH TRUONG TRAN and THE ALPHONSE HOTEL CORP. d/b/a THE CARTER HOTELS, and JUDE HOTEL CORP., d/b/a THE HOTEL KENMORE,

Defendants.

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91 Civ. 6818 (RPP)
OPINION AND ORDER

APEARANCES

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ROBERT P. PATTERSON, Jr., U.S.D.J.

This is an action brought by Plaintiff Tho Dinh Tran ("Tran") for failure to pay back wages in which plaintiff alleges violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206-207, breach of contract, fraud and unjust enrichment, as well as violations of New York Labor Law section 198. Defendant moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing plaintiff's claims. For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

Defendant Dinh Truong Tran ("Truong") is the president and major stockholder of the defendant hotels, the Hotel Carter and the Hotel Kenmore, and exercised control over the daily operations and

management of each hotel. Am. Compl. ¶ 12. In March 1982, plaintiff emigrated to this country from Vietnam by way of Hong Kong under the sponsorship of Truong. Three days after his arrival, plaintiff began working for defendant Hotel Carter under the supervision of Truong.

The Hotel Association of New York City, Inc. (the "Employer"), of which defendant hotels are members, and the New York Hotel and Motel Trade Council, AFL-CIO (the "Union") entered into a collective bargaining agreement on March 17, 1981 (the "1981 CBA"). The 1981 CBA was superseded and annulled by a collective bargaining agreement entered into by the Employer and the Union on June 26, 1985 (the "1985 CBA").[1] Each CBA "provides that any employee of a signatory to the [CBA] who works more than thirty days, automatically becomes a union member, subject to" the CBA. Pl.'s 3(g) Statement ¶ 16. For purposes of this summary judgment motion the parties agreed at oral argument that as of April 1982 plaintiff became a member of the Union until 1985, and that his Union membership resumed in 1989.

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[1] Pursuant to section 57 of the 1985 CBA, the 1985 CBA superseded and annulled the 1981 CBA.

During the term of his employment from 1982 to 1988 and in exchange for his work for defendant, plaintiff received room and board and $300 per week pay. According to plaintiff "room and board are not charged to employees of defendants whom [sic] live at the hotels of defendants." Id. ¶ 13.

Plaintiff worked for the defendants from March 1982 to June 1985, at which time he quit due to Truong's alleged refusal to pay plaintiff his full wages since 1982. Plaintiff alleges that upon his resignation he demanded his back wages from defendants. Am. Compl. ¶ 25.[2]

Defendant Truong is alleged thereafter to have made oral promises to plaintiff on behalf of Truong and corporate defendants that defendants would pay him his full wages as well as all back wages due plaintiff if he returned to work for the defendant hotels. Plaintiff returned to work for defendants in December 1988 and was employed at the Hotel Carter. He remained an employee of defendants until July 1991. On or about

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[2] In his affidavit, defendant Truong claims that upon plaintiff's resignation from the Hotel Carter in June 1988, Truong loaned plaintiff a total of $175,000 to help start a new business, but that plaintiff never repaid this loan.

July 4, 1991, however, Plaintiff again resigned his position as an employee of defendants on the ground that "defendants continued to breach their agreement to pay his back wages from 1982 to the present." Pl.'s 3(g) Statement ¶ 10.

Both section 15 of the 1981 CBA and section 26 of the 1985 CBA require arbitration of all disputes between the defendant employers, who are signatories of the CBA's, and employees of the defendants who are members of the Union. Both sections read as follows:

COMPLAINTS, GRIEVANCES AND ARBITRATION

All complaints, disputes or grievances arising between the parties hereto involving questions or interpretation or application of any clause of this Agreement, or any acts[,] conduct or relations between parties, directly or indirectly, which shall be referred to a permanent umpire to be known as the Impartial Chairman, and his decision shall be final and binding upon the parties hereto. Any such complaint, dispute or grievance shall in the first instance, be submitted to the Labor Manager who will be appointed and employed by the [Employers' Hotel Association] to consider and adjust with a duly accredited

representative of the Union, for their joint consideration and adjustment; if they agree, such decision shall be binding on the parties hereto. Should the matter not be resolved by the Labor Manager and the representative of the Union, it shall then be referred to the Impartial Chairman as aforesaid.

See Truong Aff. Ex. C.

There is no dispute that plaintiff did not attempt to grieve or seek to arbitrate his disputes with defendants as required by the 1981 and 1985 CBAs. See Tran Dep. At 101, Truong Aff. Ex. D. Instead, on October 10, 1991, plaintiff filed suit in Federal Court to recover back wages and punitive damages from defendants.

In his first claim for relief, which alone is brought under the FLSA, 29 U.S.C. § 206-207, plaintiff claims that he "performed work, labor and services for which schedules and rates of pay are provided for in the" CBAs, but that "Defendants have never paid plaintiff at any time in conformity with those schedules and rates of pay." Pl.'s 3(g) Statement ¶¶ 19-20. Specifically, plaintiff claims that defendants intentionally failed to pay any wages to plaintiff other than room, board and fod for the period March 1982 to August 1985, made on

partial payments to plaintiff from September 1987 to August 1990, and failed to pay any wages from September 1990 to July 1991. Am. Compl. ¶ 35. Plaintiff also alleges that he is entitled to recover for "vacation and holiday time or pay" which defendants were obligated to pay him "under the Collective Bargaining Agreement." Id.

In his second claim for relief, plaintiff claims that in December 1988 defendants promised plaintiff to pay all his back wages from 1982 if he resumed working for defendants, but that defendants failed thereafter to pay plaintiff his back wages and pay. Id. ¶¶ 40-41; Pl.'s 3(g) Statement ¶¶ 19-20.

In his third claim for relief, plaintiff further claims that defendants' promises to pay him his back wages and full pay if he returned to work for them constituted fraud because at the time these promises were made defendants had no intention of abiding by them. Am. Compl. ¶ 44.

In his forth claim for relief, for unjust enrichment, plaintiff claims that the "Defendants have unjustly reaped the benefits from the work, labor and services performed for them by the plaintiffs [sic]." Id. ¶ 49.

In the fifth claim for relief, plaintiff alleges that

defendants breached the CBAs by failing to pay plaintiff the wages owed him under the CBA, and by requiring "plaintiff to work longer hours than permitted under the Collective Bargaining Agreement, and impos[ing] harsh working conditions on plaintiff which were prohibited by the Collective Bargaining Agreement." Id. ¶ 58. Finally, count six of the amended complaint claims that defendants violated New York Labor Law § 198.

Discussion

Summary Judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genine issue of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

I. STATE AND COMMON LAW CLAIMS

Defendants move to dismiss plaintiff's state law

and common law claims, as well as certain of plaintiff's claim under the FLSA. In support of their motion for summary judgment dismissing plaintiff's state law and common law claims, defendants argue that (1) plaintiff failed to arbitrate the current dispute as required by the 1981 and 1985 CBAs, and therefore all of plaintiff's claims should be dismissed; and (2) plaintiff's state law claims are preempted by the FLSA. Because the Court finds that plaintiff failed to utilize the Union grievance and arbitration provided in the CBA, it need not address the issue of preemption of any remaing issues.

It is well-settled that "[a]s a general rule in cases in which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." Republic Steele Corp. v. Maddox, 379 U.S. 650, 652 (1965). Only when the union "refuses to press or only perfunctorily presses the individual's" state law or common law claims "may the claimant seek other forms of redress." Id.; see Drywall Tapers & Pointers Local 1974 v. Local 530, 954 F. 2d 69, 77 (2d Cir. 1992). But unless the collective bargaining agreement between the employee's union

and his employer provides otherwise -- for example, by stating expressly that arbitration is not the exclusive remedy at court -- "there can be no doubt that the employee must afford the union the opportunity to act on his behalf." Id.

The general rule requiring employees first to exhaust the modes of redress provided by a collective bargaining agreement before suing in federal court serves several purposes. First, it advances the unions interest in prosecuting employee grievances, enhances the union's prestige with employees, and "complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." Id. at 653. Second, it serves the employer's interests "by limiting the choice of remedies available to aggrieved employees." Id. Third, the rule provides both the union and the employer with a "uniform and exclusive method for orderly settlement of employee grievances." Id.

Accordingly, absent a showing that the aggrieved employee has attempted to resort to grievance and arbitration procedures as provided by a collective bargaining agreement, the employee is precluded from

instituting a suit in federal court to recover pay and other damages arising out of disputes covered by the agreement. See United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) ("The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute"). Moreover, because this case involves a collective bargaining agreement that implicates labor policies, see Republic Steele, 379 U.S. at 653, it is to be contrasted from those cases in which a party seeking arbitration must move to compel arbitration based on an arbitration clause contained in an ordinary, non-labor commercial agreement. See Rush v. Oppenheimer & Co., 779 F. 2d 885, 887 (2d Cir. 1985); Com-Tech Assoc. v. Computer Assoc. Int'l, Inc., 938 F. 2d 1574, 1576 (2d Cir. 1991).

Plaintiff acknowledges that he did not attempt to utilize the grievance and arbitration procedures required to be pursued as the exclusive modes of preliminary redress under section 26 of the 1985 CBA and section 15 of the 1981 CBA. All of plaintiff's state law and

common law claims are covered by the grievance and arbitration procedure contained in the CBAs. These claims either "directly or indirectly" arise out of the "acts, conduct or relations between "plaintiff and defendants or involve the "application of [a] clause" contained in the CBAs. Mckee v. Transco Products, Inc., 874 F. 2d 83, 87 (2d Cir. 1989) ("Because the federal policy in favor of private dispute resolution is so strong, there is a presumption of arbitrability that is particularly applicable when the governing labor contains a broad arbitration clause"). Under the doctrine announced in Republic Steel, plaintiff is precluded from bringing an action in the federal court asserting these state law and common law claims. Republic Steel, 379 U.S. at 657; Tombrello, 763 F. Supp. 541, 544 (N.D. Ala. 1991) (state law claims may be preempted by Section 301 of the LMRA, 29 U.S.C. § 185, if they are for "violation of a collection bargaining agreement").

Accordingly, defendants' motion for summary judgment dismissing plaintiff's state law and cmmon law claims is granted.

II. FLSA

The cause of action is the only cause of action that

includes plaintiff's FLSA claims. Section 206 of the FLSA requires the payment of a minimum wage; section 207 prescribes a maximum work week of forty hours.

29 U.S.C. § 206

Defendants argue that they are entitled to summary judgment on plaintiff's claim under § 206 of the FLSA claim if plaintiff fails to account for the wages he received in gratuities. This argument is inappropriate on a motion for summary judgment, and is relevant to damages, not liability. Plaintiffs agree, in any event, that the tips received by plaintiff in the course of his employment with defendants may be offset from any damages assessed against defendants pursuant to § 206.

29 U.S.C. § 207 Claim

Claims under § 207 of the FLSA do not apply to employees with workweeks of forty or fewer hours. Plaintiff admitted to having worked only forty hours in 1991, see Def. Notice of Motion, Ex. B, and therefore he cannot recover overtime compensation under § 207 of the FLSA for 1991. Because defendants have not

provided records of the hours plaintiff worked in years prior to 1991, defendants' motion for summary judgment as to the years from 1982 through 1990 is denied.

Vacation and Holiday Pay

Plaintiff is not entitled to payment for vacation or holidays under 29 U.S.C. § 216, which states that an employer who violates the FLSA shall be liable to its employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation ... and in an additional equal amount as liquidated damages." Plaintiff alleges that holiday and vacation pay are provided for in the CBAs. Am. Compl. ¶ 35. He may seek to recover such holiday and vacation pay by arbitrating his dispute as required by the CBAs. Accordingly, defendants' motion for summary judgment to dismiss plaintiff's claims for holiday and vacation pay pursuant to 29 U.S.C. § 216 is granted.

Punitive Damages

Plaintiff concedes that punitive damages are not available for plaintiff's first cause of action under § 206 and § 207 of the FLSA and are barred. Accordingly,

defendants' motion for summary judgment as to plaintiff's claim for punitive damages based on § 206 and § 207 is granted.

Standby Time

Defendants move to dismiss plaintiff's claims to the extent that they seek to recover for stand-by time, that is, the period during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes. See 29 C.F.R. § 785.16(a) (1993). Such a period does not constitute hours worked for which the employee may be compensated. Plaintiff has denied that he was given any stand-by time, and defendants have introduced no evidence to the contrary. Accordingly, defendants' motion for summary judgment on this basis is denied.

Counsel for both parties are ordered to submit by September 6, 1993, memoranda addressing the issue of whether plaintiff's remaining claims under the FLSA are affected by the arbitration clause contained in the CBAs.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted in part and denied in part.

All counsel are to attend a pretrial conference on September 20, 1993 at 9:00 a.m. in courtroom 302.

IT IS SO OREDERED.

Dated: New York, New York
August 13, 1993

Robert P. Patterson, Jr.
U.S.D.J.